

12-1-2018

PREVIEW; *Bullock v. Fox*: The Meaning of the Term “Land Acquisition” in Mont. Code Ann. § 87–1–209(1)

Jacob Rebo

Alexander Blewett III School of Law

Follow this and additional works at: https://scholarworks.umt.edu/mlr_online

Let us know how access to this document benefits you.

Recommended Citation

Jacob Rebo, Oral Argument Preview, *Bullock v. Fox*: The Meaning of the Term “Land Acquisition” in Mont. Code Ann. § 87–1–209(1), 79 Mont. L. Rev. Online 60, https://scholarship.law.umt.edu/mlr_online/vol79/iss1/10.

This Oral Argument Preview is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review Online by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

PREVIEW; Bullock v. Fox: The Meaning of the Term “Land Acquisition” in Montana Code Annotated § 87–1–209(1)

Jacob Rebo

Oral Argument is set for Wednesday, December 5, 2018 at 9:30 a.m. in the Courtroom of the Montana Supreme Court in Helena, MT.

I. INTRODUCTION

This case presents the Court with two issues. The first is whether Petitioners (collectively “Gov. Bullock”), Governor Bullock, in his official capacity, and Martha Williams, in her official capacity as Director of the Fish, Wildlife, and Parks Department (“FWP”), have standing to bring suit against Respondent (“Att’y Gen. Fox”), Attorney General Fox, in his official capacity.¹ The second issue before the Court is whether the term “land acquisition” in Mont. Code Ann. § 87–1–209(1) applies to non-possessory property interests.²

II. FACTUAL AND PROCEDURAL BACKGROUND

The Montana Legislature enacted § 87–1–209(1) in 1981.³ The relevant portion of the statute reads:

. . . the department [FWP], with the consent of the commission or the board and, in the case of land acquisition involving more than 100 acres or \$100,000 in value, the approval of the board of land commissioners, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection.⁴

Since 1982, FWP has brought sixty–nine conservation easement proposals before the Land Board (“Board”).⁵ Prior to September, 2017, the Board had unanimously voted on every conservation easement proposal, approving 66 and unanimously rejecting only

¹ Brief of Respondent at 3, *Bullock v. Fox*, <https://perma.cc/F72X–NHZC> (Mont. Nov. 13, 2018) (No. OP 18-0599).

² Petitioner’s Principal Brief at 9, *Bullock v. Fox*, <https://perma.cc/U7SW–5KHA> (Mont. Oct. 22, 2018) (No. OP 18-0599).

³ *Id.* at 13.

⁴ 57 Op. Att’y Gen. 4 at [P3], <https://perma.cc/F2T2–V7G9> (Mont. Oct. 15, 2018).

⁵ Brief of Respondent, *supra* note 1, Exhibit A, Attachment 1.

one.⁶ Since October, 2017, the Board has approved only one conservation easement proposal and rejected three others with fractured votes.⁷ The FWP Commission has approved each of the three rejected proposals.⁸ Gov. Bullock ordered FWP to proceed with the easement purchases at issue here pursuant to an interpretation of § 87–1–209(1) that does not require Board approval for conservation easement purchases.⁹

Pursuant to this interpretation, Att’y Gen. Fox, at the request of Senate President Scott Sales, issued an opinion rejecting Gov. Bullock’s interpretation of § 87–1–209(1).¹⁰ Gov. Bullock petitioned the Supreme Court for declaratory relief, arguing that the Supreme Court has original jurisdiction to hear this case.¹¹ Att’y Gen. Fox responded, challenging Gov. Bullock’s standing and arguing that “land acquisitions” in § 87–1–209(1) includes non-possessory land interests such as conservation easements, necessitating Board approval.¹²

III. THE STANDING ISSUE

A. *The Parties’ Arguments*

Gov. Bullock requests relief based on the requirements for original jurisdiction in Rule 14(4) of the Montana Rules of Appellate Procedure.¹³ They argue that (1) the case involves a purely legal question of statutory construction; (2) the case has major statewide importance, and (3) the situation is urgent and therefore the normal appeal process is inadequate.¹⁴ Gov. Bullock maintains that review is appropriate without specifically addressing standing.¹⁵

On the other side, Att’y Gen. Fox does not challenge that the matter in dispute meets the criteria for original jurisdiction. Att’y Gen. Fox does argue that Gov. Bullock has no standing to bring this action.¹⁶ Att’y Gen. Fox argues that Gov. Bullock: (1) cannot show an actual or imminent injury that would affect them in a “personal and individual way”; (2) that Gov. Bullock cannot bring the action

⁶ *Id.*

⁷ Brief of Respondent, *supra* note 1, Wolf Affidavit, Attachment 1.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ 57 Op. Att’y Gen. 4, *supra* note 4, at [P1].

¹¹ Petitioner’s Principal Brief, *supra* note 2, at 18.

¹² Brief of Respondent, *supra* note 1, at 21.

¹³ Petitioner’s Principal Brief, *supra* note 2, at 7–8.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Brief of Respondent, *supra* note 1, at 3–10.

solely in their official capacities; and (3) because the injury is to the State, any action to be brought would be under the sole discretion of the Attorney General.¹⁷

The first issue Att’y Gen. Fox raises is that Gov. Bullock cannot show sufficient injury to satisfy standing.¹⁸ Att’y Gen. Fox argues that the Court cannot hear this case unless Gov. Bullock can show a personal past, present, or threatened injury to a property or a civil right that would be alleviated by the Court’s action.¹⁹ Att’y Gen. Fox argues that the alleged injury is to the State, or at most to the offices of Gov. Bullock, which would arguably be irrelevant here because they are bringing suit in their official capacities.²⁰

The second issue Att’y Gen. Fox raises is that Gov. Bullock may not bring suit in their official capacities.²¹ To support this argument, Att’y Gen. Fox cites *Raines v. Byrd*,²² a United States Supreme Court case that held individual members of Congress did not have sufficient “personal stake” to satisfy standing requirements.²³

Att’y Gen. Fox’s final argument concerning standing is that Gov. Bullock cannot bring this issue to the Court because the Attorney General has the sole prerogative to bring cases on behalf of the State, and he has not approved this matter.²⁴ Att’y Gen. Fox cites *Olsen v. PSC*, a case where the Court held that the Attorney General could not be precluded from arguing a case on the State’s behalf.²⁵ Att’y Gen. Fox argues that this gives the office of Attorney General exclusive discretion as to the state matters the Court is constitutionally allowed to hear.²⁶ The Montana Constitution provides that the AG is the “legal officer of the State.”²⁷ The duties of the Attorney General according to Montana Code Annotated § 2–15–501(1) include the responsibility “to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer’s official capacity is a party or in which the state has an interest.”

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ *Mitchell v. Glacier Cty.*, 406 P.3d 427, 431 (Mont. 2017).

²⁰ Brief of Respondent, *supra* note 1, at 4–9.

²¹ *Id.* at 5–6.

²² *Raines v. Byrd*, 521 U.S. 811 (1997).

²³ *Id.* at 818–19.

²⁴ Brief of Respondent, *supra* note 1, at 8–9.

²⁵ *State ex. Rel. Olsen v. Public Serv. Comm’n*, 283 P.2d 594, 597 (Mont. 1955).

²⁶ Brief of Respondent, *supra* note 1, at 8.

²⁷ MONT. CONST. art VI, § 4, cl 4.

B. Analysis: The Court Will Likely Find Gov. Bullock Has Standing

Gov. Bullock may not be able to show a sufficient personal injury for standing. However, the Court has previously recognized standing for petitioners who meet the requirements for original jurisdiction but cannot show an injury with a direct adverse effect.²⁸ In *Grossman*, the Court held, “Where urgent and emergency factors . . . excite [the Court’s] acceptance of original jurisdiction,” the Court may “drape” the petitioner in standing despite showing no particular injury.²⁹ The case at hand appears to have similar “urgent and emergency” factors to *Grossman*. The Court noted in *Grossman* that the State was hamstrung in its ability to carry out the legislation, and that the “health and welfare of a large segment of the State’s population” would be affected, if the issue was not resolved.³⁰ Similarly, Gov. Bullock argues that the conservation easements in question will expire by the end of November.³¹ Thousands of Montanans make use of the State’s conservation easements. The Court could find that the issue is not only ripe but has “urgent and emergency factors” sufficient to grant Gov. Bullock standing.

Att’y Gen. Fox argues that *Raines* holds that public officials may not bring suit solely in their official capacity.³² This is an incorrect reading of *Raines*. The *Raines* Court upheld *Coleman v. Miller*,³³ a previous ruling that allowed State legislators to bring suit in their official capacity.³⁴ The dispositive issue was that the State legislators constituted a large enough group that their votes would have been sufficient to defeat or enact the specific legislation in question before the Court.³⁵ In short, public officials may bring suit in their official capacity if the issue “completely nullifies” their ability to carry out their official duties.³⁶ The governor is constitutionally charged with faithfully executing the laws of the State.³⁷ His powers to do so in this instance have arguably been “completely nullified” by the disagreement over the meaning of a statute he is trying to enforce. Additionally, the Court has previously

²⁸ *Grossman v. State, Dept. of Natural Res.*, 682 P.2d 1319, 1325 (Mont. 1984) (holding that a taxpayer has standing to challenge the constitutionality of a tax when the requirements of original jurisdiction are met).

²⁹ *Id.*

³⁰ *Id.*

³¹ Petitioner’s Principal Brief, *supra* note 2, at 2.

³² Brief of Respondent, *supra* note 1, at 7.

³³ 307 U.S. 433 (1939).

³⁴ *Raines*, 521 U.S. at 826 (citing *Coleman v. Miller*, 307 U.S. 433 (1939)).

³⁵ *Id.* at 823.

³⁶ *Id.* at 826.

³⁷ MONT. CONST. art VI, § 4.

heard cases brought by the Governor in his official capacity when urgent and important matters of statutory construction are at issue.³⁸ The Court will likely find that Gov. Bullock meets *Coleman* and can therefore bring suit in their official capacity.

Att’y Gen. Fox’s argument that the Attorney General has plenary and exclusive discretion as to which State related cases may go before the Court is overbroad and would have significant deleterious effects. Court precedent and § 2–15–501(1) clearly point to an interpretation that the AG may not be precluded from prosecuting or defending a state matter. Att’y Gen. Fox is not being precluded from arguing this case before the Court. Furthermore, the Attorney General is part of the Executive branch, but he is an elected official and does not serve at the appointment and pleasure of the Governor.³⁹ For the Court to find that his office is the only Executive branch agent that can petition the Court would drastically undermine the ability of other Executive branch agents to fulfill their Constitutionally mandated duties. The Court will likely not be persuaded by this argument from Att’y Gen. Fox.

Thus, the Court will likely ultimately find that Gov. Bullock has standing to bring suit in their official capacities against Att’y Gen. Fox.

IV. THE ISSUE OF STATUTORY INTERPRETATION

When the Court undertakes an analysis of the meaning of a term, it first looks to see if it is defined in the statute.⁴⁰ The Court then looks to the “ordinary meaning” of the term.⁴¹ If the ordinary meaning does not readily resolve the issue, the Court looks to statutory use of the term.⁴² When the Court looks to a statute for clarification of meaning, it reads the whole statute.⁴³ If meaning is still ambiguous after an intra–statute analysis, the Court may look to other relevant statutes.⁴⁴ If the Court has not found sufficient clarification within the statute, they will next turn to an analysis of

³⁸ State ex rel. Judge v. Legislative Fin. Comm., 543 P. 2d 1317 (Mont. 1975); *Schwinden v. Burlington N.*, 691 P.2d 1351 (Mont. 1984).

³⁹ MONT. CONST. art VI, § 1.

⁴⁰ *Basset v. Lamantia*, 417 P.3d 299, 321 (Mont. 2018).

⁴¹ *State v. Alpine Aviation, Inc.* 384 P.3d 1035, 1037 (Mont. 2016).

⁴² *Big Sky Colony, Inc. v. Montana Dep’t. of Labor and Indus.*, 291 P.3d 1231, 1245 (Mont. 2012).

⁴³ *Id.*

⁴⁴ *Id.*

legislative history.⁴⁵ Finally, if the Court still cannot ascertain meaning, they may look to outside sources, such as public policy.⁴⁶

A. *The Parties' Arguments*

The term “land acquisition” is not defined in the statute, so the Court will look first for the “ordinary meaning” of the term.⁴⁷ Gov. Bullock and Att’y Gen. Fox argue for two different meanings of “land acquisition,” citing the same dictionary definitions for “land” and “acquisition.” Gov. Bullock argues that a combination of dictionary definitions of the two separate terms clearly means “gaining possession of a portion of the earth’s solid surface.”⁴⁸ Att’y Gen. Fox notes that Gov. Bullock’s combination of the definitions of “land” and “acquisition” could also be formulated as “gaining possession **or control** over a portion of the earth’s solid surface.”⁴⁹ Att’y Gen. Fox argues that “land acquisition” is a non-specific term that refers to any “legally cognizable interest in land.”⁵⁰

Gov. Bullock argues that the statute clearly espouses a definition of “land acquisition” that excludes non-possessory interests in land. Section 87 of the Montana Code Annotated contains three references to “land acquisition.”⁵¹ The first is the provision in question, § 87–1–209(1). The second is in § 87–1–301(1), which states that the FWP Commission must approve “all acquisitions . . . of interests in land.”⁵² Gov. Bullock argues that this distinction is dispositive, relying on the canon of meaningful variation, which holds that where legislators use different terms within the same statute, the Court may infer different meanings.⁵³ The third use of “land acquisition” in § 87–1–218 requires notice for all “land acquisitions,” which does not offer any clarity to the meaning in § 87–1–209(1).⁵⁴

Att’y Gen. Fox argues that the different terms in Section 87 do not refer to type, but rather to scope, stating that the use of “acquisitions of interests in land” in § 87–1–301(1) refers to all land

⁴⁵ Gannet Satellite Info. Network, Inc. v. Montana Dep’t. of Revenue 201 P.3d 132, 136 (Mont. 2009).

⁴⁶ See Theil v. Taurus Drilling, Ltd., 710 P.2d 33 (Mont. 1985).

⁴⁷ Petitioner’s Principal Brief, *supra* note 2, at 9.

⁴⁸ *Id.* at 10.

⁴⁹ Brief of Respondent, *supra* note 1, at 16 (emphasis in original).

⁵⁰ Op. Att’y Gen. 4, *supra* note 4, at [P17].

⁵¹ Petitioner’s Principal Brief, *supra* note 2, at 10–12.

⁵² *Id.* at 10–11.

⁵³ *Id.* at 11.

⁵⁴ *Id.* at 12.

interest acquisitions, and that the “land acquisition” use in § 87–1–209(1) refer to all land interest acquisitions in excess of 100 acres or \$100,000.⁵⁵ Att’y Gen. Fox and Gov. Bullock both agree with the Court that an easement is not a possessory interest in land.⁵⁶

Gov. Bullock supports his interpretation of “land acquisition” by appealing across the Code, citing 11 statutory uses of the term “land acquisition.”⁵⁷ Gov. Bullock argues that every use of “land acquisition” in the Code outside of Section 87 appears in conjunction with possessory interests in land, and never with non-possessory interests, supporting a definition of “land acquisition” that does not include nonpossessory interests such as conservation easements.⁵⁸

Att’y Gen. Fox argues that any ambiguity in § 87–1–209(1) is clarified by § 23–1–102(3):

A contract, for any of the purposes of this part, many not be entered into or another obligation incurred until money has been appropriated by the legislature or is otherwise available. If the contract or obligation pertains to acquisition of areas or sites in excess of either 100 acres or \$100,000 in value, the board of land commissioners shall specifically approve the acquisition.”⁵⁹

Att’y Gen. Fox argues that this language is clear and unambiguous, and that Gov. Bullock’s reading of “land acquisition” would allow the State Parks and Recreation Board to acquire conservation easements without the approval of the Board, which Respondent argues would “defy logic.”⁶⁰

The “ordinary meaning” arguments do not provide the necessary clarity to determine that “land acquisition” contains or excludes non-possessory interests in its plain meaning. The same dictionary meanings are combined to provide two different definitions of “land acquisition.” The Court will need to look to the statute for clarification.

⁵⁵ *Id.*

⁵⁶ Petitioner’s Principal Brief, *supra* note 2, at 10; 57 Op. Att’y Gen. 4, *supra* note 4, at [P4].

⁵⁷ Petitioner’s Principal Brief, *supra* note 2, at 12.

⁵⁸ *Id.*

⁵⁹ Brief of Respondent, *supra* note 1, at 13.

⁶⁰ *Id.* at 13–14.

B. Analysis of “ordinary meaning” and Statutory Interpretation.

The arguments supporting either interpretation using the language of Section 87 both have merit, and it is difficult to predict if the Court will be swayed by either of them. The Court has adhered to the canon of meaningful variation in the past, but both Gov. Bullock and Att’y Gen. Fox agree that the meanings of §§ 87–1–209(1) and 301 have different meanings.⁶¹ The Court will likely turn to other relevant statutes for clarification.

Gov. Bullock’s analysis cites every other instance of the term “land acquisition” found within the code.⁶² Each instance implies only possessory interests. No instant use explicitly excludes non-possessory interests in land, but the term is never used in connection with regulating easements or other non-possessory interests in land.

On Att’y Gen. Fox’s argument that Gov. Bullock’s reading would “defy logic,” it is noteworthy that Section 23 of the Code makes no reference to conservation easements whatsoever. It is unclear if the Parks and Recreation board oversees the acquisition of any non-possessory interests in land. Furthermore, if an adoption of Gov. Bullock’s narrow definition of “land acquisition” would allow the Parks and Recreation board to approve non-possessory land interest purchases, Att’y Gen. Fox fails to clarify why this would “defy logic” without begging the question of what “land acquisition” means.

This level of argument favors Gov. Bullock’s reading of “land acquisition” in § 87–1–209(1). The Court may conclude at this stage that the statutory analysis is sufficient to determine that the legislature intended “land acquisition” in § 87–1–209(1) to exclude non-possessory interests such as conservation easements. If the Court has not found sufficient meaning, they will next turn to a legislative history analysis.

V. The Issue of Legislative History

⁶¹ *Zinvest, LLC v. Gunnersfield Enters, Inc.*, 405 P.3d 1270, 1276 (Mont. 2017) (“Because the enacting Legislature did not use identical language in the two provisions, it is proper . . . to assume that a different statutory meaning was intended.”).

⁶² I conducted separate searches of “land acquisition,” “land,” and “acquisition” within the Montana Code Annotated. The 11 statutes cited in the Petitioner’s Brief are the only instances outside of Section 87 at issue in this case.

If the Court cannot ascertain meaning through statutory construction, it will next turn to an analysis of legislative history.⁶³

A. The Parties' Arguments

Gov. Bullock looks to the legislative history of § 87–1–209(1) to argue that the legislature's purpose for passing the proposed statute was to respond to citizens' concerns that the State government's purchase of conservation lands would erode their tax base.⁶⁴ The statute provides that FWP will pay a sum equal to the taxes payable to the county if it was taxable to a private citizen.⁶⁵

Att'y Gen. Fox agrees that this was a large focus of the legislation but argues that it was not the only intent for the statute.⁶⁶ Att'y Gen. Fox argues that other concerns, such as concerns about Government spending, support a broad interpretation of "land acquisition."⁶⁷ Att'y Gen. Fox also cites to comments made during debate of the statute, where then-FWP Commissioner Jim Flynn argued against the bill because FWP's "acceptance of conservation easements would be curtailed."⁶⁸ This statement, Att'y Gen. Fox maintains, is dispositive in determining that the legislature intended to include non-possessory interests in the definition of "land acquisition."⁶⁹

In response, Gov. Bullock argues that Commissioner Flynn made this statement opposing an earlier version of the bill that never made it out of committee, and that he made this statement in broad opposition to the provisions of the bill that he felt would inhibit FWP's ability to acquire conservation easements and not to the specific provisions concerning Board approval.⁷⁰ Gov. Bullock further supports this reading of Flynn's comments by noting that Flynn, directly after the statute was enacted, maintained that conservation easements did not require approval of the Board.⁷¹

B. Analysis of Legislative History

⁶³ *Gannett Satellite Info. Network, Inc. v. Montana Dep't. of Revenue* 201 P.3d 132, 136 (Mont. 2009).

⁶⁴ Petitioner's Principal Brief, *supra* note 2, at 13–14.

⁶⁵ MONT. CODE ANN. § 87–1–218(3)(c) (2017).

⁶⁶ Op. Att'y Gen. 4, *supra* note 4, at [P37].

⁶⁷ *Id.*

⁶⁸ *Id.* at [P38–39].

⁶⁹ *Id.*

⁷⁰ Petitioner's Principal Brief, *supra* note 2, at 14.

⁷¹ *Id.* at 13, 17–18.

The legislative history for § 87–1–209(1) is unclear as to the intent of the legislature to include non-possessory interests in the definition of “land acquisitions.” Both Gov. Bullock and Att’y Gen. Fox appear to agree that the main drive behind the legislation was to protect the tax base.⁷² Att’y Gen. Fox presented one comment from a legislator that raises the issue of Government spending and accountability.⁷³ This one comment is insufficient to conclude that the legislature clearly intended “land acquisitions” to include non-possessory interests in the statute.

Additionally, Commissioner Flynn’s comments during the legislative debate taken without context would support Att’y Gen. Fox’s argument that Flynn believed “land acquisition” in § 87–1–209 to refer to non-possessory interests. However, an examination of the full record, including his subsequent comments and behavior, support that Flynn was opposed to the bill in general and was not conceding that Board approval would apply to the acquisition of non-possessory property interests.

If the Court finds itself looking to the legislative history in this case to determine the meaning of “land acquisition,” neither argument tips the scale. Att’y Gen. Fox’s arguments establish that the legislature did not explicitly intend to exclude non-possessory interests from the meaning, but both sides concede that the main purpose of the bill was to protect the tax base.⁷⁴ Att’y Gen. Fox’s arguments that the legislature explicitly intended to include non-possessory interests is a misuse of Commissioner Flynn’s comments. Therefore, this mode of statutory construction does not conclusively favor either interpretation.

VI. PUBLIC POLICY ARGUMENTS

Finally, if the Court still cannot ascertain meaning, it may look to outside sources, such as public policy.⁷⁵

A. *The Parties’ Arguments*

⁷² Petitioner’s Principal Brief, *supra* note 2, at 13–14; Op. Att’y Gen. 4, *supra* note 4, at [P37].

⁷³ Op. Att’y Gen. 4, *supra* note 4, at [37], citing Minutes of the Meeting of the Fish and Game Committee, at 3 (Jan 24, 1981) (“Representative Curtiss, the primary sponsor of HB 251, testified she was concerned with the amount of money the F.W. & P. can spend on land acquisition.” (internal quotations omitted)).

⁷⁴ Petitioner’s Principal Brief, *supra* note 2, at 13–14; Op. Att’y Gen. 4, *supra* note 4, at [P37].

⁷⁵ See *Theil v. Taurus Drilling, Ltd.*, 710 P.2d 33 (Mont. 1985).

In his final argument, Att’y Gen. Fox refers to FWP’s long history of bringing conservation easement proposals to the land board for approval.⁷⁶ This argument also refers to the FWP administrative guidance on conservation easements, which states that conservation easements over the size and price amount in § 87–1–209 will be brought before the Board for approval.⁷⁷ The FWP began bringing conservation easement proposals before the land board in 1992.⁷⁸ It adopted the practice as agency policy.⁷⁹ Att’y Gen. Fox argues that these facts show FWP’s “repeated assurances to the public that FWP’s expenditures of funds for the easement acquisitions would be subject to (approval by the Land Board).”⁸⁰ Finally, Att’y Gen. Fox presents a letter, written by Don Childress, an FWP administrator, in 1992, which states that “Statute 87–1–209 requires approval of this easement by the Land Board.”⁸¹

Gov. Bullock argues against this reasoning, instead relying on the public policy of adhering to the meaning of the statute. Gov. Bullock states, “Here, the notion that an agency is bound by a prior, incorrect interpretation of a statute is both wrong as a matter of law and troubling as a matter of policy. Past practice cannot transfigure the meaning of a statute.”⁸² This argument is not supported by any cited case law, but Gov. Bullock cites § 1–2–102, which states that “[i]n the construction of a statute, the intention of the legislature is to be pursued if possible.”⁸³

B. Analysis of the Public Policy Arguments

Att’y Gen. Fox’s argument here seems to rest on the notion of acquiescence. Notably, the Court has applied the notion of legislative acquiescence in the past.⁸⁴ Additionally, the Court has supported Gov. Bullock’s public policy argument as it has held previously that the State “cannot be estopped by the unauthorized acts of its officers or agents.”⁸⁵ This holding supports the policy

⁷⁶ Op. Att’y Gen. 4, *supra* note 4, at [41].

⁷⁷ *Id.* at [42].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at [49].

⁸¹ Brief of Respondent, *supra* note 1, Exhibit B, Attachment 1.

⁸² Petitioner’s Principal Brief, *supra* note 2, at 17.

⁸³ *Id.*

⁸⁴ *Darby Spar, LTD. v. Dep’t of Revenue*, 705 P.2d 111, 113 (Mont. 1985). The Court upheld a 40-year-old tax statute’s present application because the legislature had “acquiesced” to it, saying: “Forty years is adequate time for the legislature to become aware of how the legislation it drafted is being interpreted and enforced.”

⁸⁵ *Norman v. Montana*, 597 P.2d 715, 718 (Mont. 1979) (internal citations omitted).

argument that the correct interpretation of a statute is the benchmark for the Judiciary. Similarly, In *O'Shaughnessy*, the Court held that the acts of administrators or executive officials interpreting statutes cannot change the clear meaning of the legislation.⁸⁶ The *O'Shaughnessy* Court held that to accept legislative acquiescence would “undermine the enactments by official action and nullify otherwise validly adopted laws.”⁸⁷ Although this case is factually different from *O'Shaughnessy*, the Court clearly articulated Gov. Bullock’s sentiment in its ruling.

Should the Court weigh these two arguments, it will not only be faced with evaluating the facts of each precedent with the case at hand. It will also be faced with weighing the validity of the dueling underlying policy arguments. Is acquiescence, the notion that a legislature’s inaction can provide dispositive information about the intent of the statute, more relevant or important here? Or, is it more applicable and imperative that statutes mean what they mean, and incorrect administrative or executive interpretation, even when it spans several years, cannot change that meaning?

VII. CONCLUSION

Ultimately, the Court will likely find the necessary requirements for standing and original jurisdiction are met. On the question of statutory interpretation, the totality of the legislative record suggests that it is likely the Court will find “land acquisition” to refer only to possessory interests in land as pertaining to § 87–1–209(1).

⁸⁶ *O'Shaughnessy v. Wolfe*, 685 P.2d 361, 368 (Mont. 1984).

⁸⁷ *Id.* at 364.